Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits

HIGH COURT (SEREMBAN) — CIVIL SUIT NOS 22–179 OF 1998, 22–177 OF 1998 AND 22–181 OF 1998
LOW HOP BING J
26 MARCH 2007

Tort — Defamation — Libel and slander — Action for damages — Minutes of meeting of office bearers of Luak Rembau of Negeri Sembilan — Whether words defamatory

Tort — Defamation — Libel and slander — Defences — Justification — Whether facts upon which minutes recorded were true

The plaintiff had instituted three separate suits for libel and slander against each defendant viz Abdul Aziz bin Abdan ('D1'); Mohd Shaari bin Yasin ('D2') and Zakaria bin Dahlan ('D3'). By consent, these suits were tried jointly. The plaintiff's cause of action was founded on the words uttered and published by DD1 to 3 respectively at a meeting held on 27 December 1997 ('the meeting') as recorded in the minutes of the meeting ('the minutes'). The parties herein were the members and office bearers of Luak Rembau of Negeri Sembilan. The chief thereof was YTM Dato' Undang Rembau ('Undang') who administered the Malay Customary Law for the territory of Rembau.

Held:

(1) The statements recorded in the minutes imputed that the plaintiff was: (1) disloyal to the Undang; (2) abusing his position as Dato' Sedia Lela; (3) guilty of fraud and cheating, in addition to a vile and despicable act; and included fire and arson; drug and poison; and (4) seeking to overthrow the Undang (see para 13). DD1 to 3 had made the aforesaid defamatory statements against the plaintiff at the time when the plaintiff was holding the office of Dato' Sedia Lela which, according to the hierarchy in Luak Rembau, was next in line to the appointment as the Undang. He had the legitimate hope of succeeding to the exalted position of the Undang. However, in view of the defamatory statements the plaintiff was subsequently removed from his appointment as Dato' Sedia Lela and so could not be appointed as the Undang although he was next in line to the appointment (see para 28).

(2) The defendants' utterances disparaging the plaintiff who at the material time held the office of Dato' Sedia Lela constituted slander which was actionable per se under s 5 of the Defamation Act 1957. Hence, it was not necessary for the plaintiff to allege or prove special damages. The minutes which recorded the utterances were libellous and have disparaged the plaintiff. Hence, they were defamatory of the plaintiff (see paras 14–15, 18).

(3) Upon an examination and evaluation of D1's evidence, the court was unable to find anything which was capable of establishing that the allegations made by D1 against the plaintiff were anywhere near the truth. D1 could not remember any date on which the plaintiff had used his position for his own interest, but testified that he merely heard of it from the secretary of the Undang. He admitted that he did not know of the truth of the allegations that he had hurled against the plaintiff. D2's evidence was self-destructive as he agreed that the allegations which he had made against the plaintiff were untrue and he admitted that his own witness' statement was untrue. D3's evidence did not go further than giving an outline of his own biodata. In the circumstances, DD1 to 3 have failed to prove their defence of justification, and so they were liable to the plaintiff for libel and slander (see paras 22–25).

(4) The claim for RM5,000,000 by way of aggravated and exemplary damages against each of the defendants or a total sum of RM15,000,000 against them was astronomical and phenomenal. Such a mega figure was unlikely to find favour with the court. Hence, the aggravated and exemplary damages of RM200,000 was awarded against each of the defendants, with interest at 8% pa from the date of judgment to the date of realization (see paras 31–32).

[Bahasa Malaysia summary

Plaintif telah memulakan tiga guaman berasingan untuk libel dan slander terhadap setiap defendan iaitu Abdul Aziz bin Abdan ('D1'); Mohd Shaari bin Yasin ('D2') dan Zakaria bin Dahlan ('D3'). Melalui persetujuan, ketiga-tiga guaman telah dibicarakan bersama. Kausa tindakan plaintif adalah berdasarkan perkataan-perkataan yang dilafazkan dan diterbitkan oleh DD1 hingga 3 masing-masingnya di mesyuarat yang diadakan pada 27 Disember 1997 ('mesyuarat tersebut') seperti yang direkodkan dalam minit mesyuarat ('minit tersebut'). Pihak-pihak terlibat merupakan ahli-ahli dan pemegang jawatan Luak Rembau of Negeri Sembilan. Ketuanya meruapkan YTM Dato' Undang Rembau ('Undang') yang melaksanakan Undang-Undang Adat Melayu untuk kawasan Rembau.

Diputuskan:

(1) Kenyataan-kenyataan yang direkodkan dalam minit tersebut mengatakan bahawa plaintif: (1) tidak setia kepada Undang; (2) menyalahgunakan kedudukannya sebagai Dato' Sedia Lela; (3) bersalah kerana fraud dan menipu, yang ditambah kepada perbuatan yang keji dan hina; dan melibatkan kebakaran dan perbuatan membakar harta dengan sengaja; dadah dan racun; dan (4) memohon untuk menggulingkan Undang (lihat perenggan 13). DD1 hingga 3 telah membuat kenyataan-kenyataan tersebut terhadap plaintif pada masa plaintif memegang jawatan Dato' Sedia Lela yang, menurut hierarki di Luak Rembau, adalah pelantikan seterusnya sebagai Undang. Beliau mempunyai harapan yang membolehkannya berjaya dinaikkan pangkat kepada jawatan Undang. Namun, berdasarkan kenyataan-kenyataan berunsur fitnah plaintif kemudiannya telah disingkirkan daripada pelantikannya sebagai

Dato' Sedia Lela dan oleh itu tidak boleh dilantik sebagai Undang meskipun beliau dalam barisan pelantikan seterusnya (lihat perenggan 28).

(2) Ungkapan-ungkapan defendan-defendan merendah-rendahkan plaintif yang pada masa itu memegang jawatan Dato' Sedai Lela membentuk slander yang boleh diambil tindakan per se di bawah s 5 Akta Fitnah 1957. Justeru itu, adalah tidak perlu untuk plaintif mengatakan atau membuktikan ganti rugi khas. Minit tersebut yang merekodkan ungkapan-ungkapan tersebut adalah bersifat libel dan telah merendah-rendahkan plaintif. Oleh itu, ianya memfitnahkan plaintif (lihat perenggan 14–15, 18).

(3) Setelah memeriksa dan menilai keterangan D1, mahkamah tidak dapat menemui apa-apa yang boleh membuktikan bahawa pengataan-pengataan yang dibuat oleh D1 terhadap plaintif adalah benar. D1 tidak ingat mana-mana tarikh yang plaintif telah menggunakan jawatannya demi kepentingannya sendiri, tetapi memberi keterangan bahawa beliau hanya mendengar tentangnya daripada setiausaha Undang. Beliau mengaku bahawa beliau tidak mengetahui kebenaran pengataan-pengataan yang beliau telah lemparkan terhadap plaintif. Keterangan D2 membinasakan diri sendiri kerana beliau bersetuju bahawa pengataan-pengataan yang telah beliau buat terhadap plaintif adalah tidak benar dan beliau mengaku yang penyataan saksinya sendiri adalah tidak benar. Keterangan D3 tidak lebih daripada memberikan rangka kasar biodatanya. Dalam keadaan sedemikian, DD1 hingga 3 telah gagal untuk membuktikan pembelaan justifikasi mereka, dan oleh itu mereka bertanggungjawab terhadap plaintif kerana libel dan slander (lihat perenggan 22–25).

(4) Tuntutan RM5,000,000 melalui ganti rugi terkilan dan tauladan terhadap setiap defendan atau sejumlah RM15,000,000 terhadap mereka adalah terlalu banyak dan luar biasa. Jumlah besar sebegini tidak mungkin mendapat persetujuan mahkamah. Justeru itu, ganti rugi tambahan dan tauladan RM200,000 telah diawardkan terhadap setiap defendan, dengan faedah pada 8% setahun dari tarikh penghakiman hingga tarikh realisasi (lihat perenggan 31–32).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 435–439.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315 (refd)
Broome v Cassell [1972] AC 1027 (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86 (refd)
John v MGAT [1997] QB 254 (refd)
Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283 (refd)
Warwick v Foulkes (1844) 12 MW 507 (refd)

Legislation referred to

Defamation Act 1957 s 5

Firoz Hussein bin Ahmad Jamaluddin (Shanti Abraham with him) (Puthucheary Firoz & Mai) for the plaintiff.
Mohd Hasryzal bin Badasary (Hanif Hassan & Co) for the defendants.

Low Hop Bing J:

PLAINTIFF'S CLAIM

[1] The plaintiff has instituted three separate suits for libel and slander against each defendant viz Abdul Aziz bin Abdan in Civil Suit No 22–179–1998 ('D1'); Mohd Shaari bin Yasin in Civil Suit No 22–177–1998 ('D2') and Zakaria bin Dahlan in Civil Suit No 22–181–1998 ('D3'). By consent, these suits were tried jointly.

[2] The plaintiffs cause of action was founded on the words uttered and published by DD1 to 3 respectively at a meeting held on 27 December 1997 ('the meeting') as recorded in the minutes of the meeting ('the minutes').

PARTIES' POSITION

[3] The parties herein are the members and office bearers of Luak Rembau of Negeri Sembilan. The chief thereof is YTM Dato' Undang Rembau who administers the Malay Customary Law for the territory of Rembau.

[4] The respective position of the parties in Luak Rembau may be conveniently tabulated as follows:

Party	Position
Plaintiff Ismail bin Shamsuddin	Dato' Sedia Lela with effect from 14 August 1997
D1 Abdul Aziz bin Abdan	Dato' Gempa Maharaja
D2 Mohd Shaari bin Yasin	Panglima
D3 Zakaria bin Dahlan	Dato' Sedia Lela Bentara

ELEMENTS OF DEFAMATION

[5] Harking back to the elements of defamation as contained in the Defamation Act 1957, it is trite law that the plaintiff bears the burden of proving that:

(i) the words are defamatory;

(ii) they refer to the plaintiff; and

(iii) the words are published (per Mohamed Dzaiddin J (later CJ (Malaya) in *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 316).

[6] In *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283, at p 292, Ramly Ali J restated these principles as follows:

> ... the plaintiff must prove three elements of the tort of defamation which are:
> (i) the plaintiff must show that the statement bears defamatory imputations;
> (ii) the statement must refer to or reflect upon the plaintiffs reputation; and
> (iii) the statement must have been published to a third person by the defendant.

[7] More specifically in relation to the plaintiffs cause of action herein, it is incumbent on the plaintiff to prove against each of the defendants that:

(i) the words were uttered;
(ii) the words were defamatory of the plaintiff;
(iii) the words uttered were slanderous and actionable per se;
(iv) the minutes were prepared and published; and
(v) the minutes contained words which were defamatory of the plaintiff.

[8] I shall now consider each of the above elements in relation to the evidence adduced before me.

UTTERANCES OF WORDS

[9] On 27 December 1997, DD1, 2 and 3 attended the meeting, for which the minutes were prepared and recorded by D1. I shall now examine these utterances.

[10] D1's utterances were recorded in paragraphs 2.2 to 2.7 of the minutes, the essence and effect of which may be stated as follows:

Para	Essence and Effect of Utterances
2.2	As Dato' Sedia Lela, the plaintiff who has pledged allegiance to YTM Dato' Undang was not grateful to the Undang.
2.3	Plaintiff used the Undang's logo and gave the impression that his position was more exalted than that of the Undang.
2.4	Plaintiff had committed treason.
2.5	Plaintiff as the Undang's personal assistant harbours an ill intention against the Undang.
2.6 and 2.7	and Plaintiffs misconduct is even more serious and more dangerous than an act of treason as contained in the words 'Dhaga-dhagi — Derhaka Celaka Rumbun bakar — Upas racun' (Disloyalty — Deceit — Treason — Fire and Arson; Drug and Poison (exh D3 p 110).

[11] The words uttered and published by D2, as contained in paras 7.1 and 7.2 of the minutes, are to the following effect:

Para	Utterances
7.1	The plaintiff has abused his powers as Dato' Sedia Lela in that he has made decisions for other members of the Lembaga.
7.2	Plaintiff had abolished the Buapak Suku Tergantung and so had incurred the wrath of the descendants of the same.

[12] The relevant words uttered and published by D3, as recorded in paras 3.1 to 3.6 of the minutes, are to the following effect:

Para	Utterances
3.1	Plaintiff referred to the stone age of Rembau when it should have been Rembau's traditional age.
3.2 and 3.3	and Plaintiff used the seal which is specially confined to the Yang di Pertuan Agong, the Malay Rulers, the four Undangs and Tuanku Besar of Tampin, without the prior permission of the Protocol and Ceremonies Division of the Prime Minister's Department and without referring to the Undang and Dato'-Dato' Lembaga Luak Rembau.
3.4 and 3.5	and Plaintiff has sent to Kuala Lumpur many letters bearing the Undang's letterhead and the seal of the Undang, thereby creating an embarrassing situation and lowering the dignity of the Undang's office, because as a Dato' Lembaga he has to use his own stationery and seal for his own correspondence.
3.6	The plaintiff had used the address of Balai Undang Luak Rembau for his own purposes, and has thereby embarrassed the Undang.

WORDS DEFAMATORY OF PLAINTIFF

[13] In addition to the effect of the words uttered and published by the defendants as specifically enumerated above, I am of the view that those words had disparaged the plaintiff and imputed that the plaintiff was:

(i) disloyal to the Undang;

(ii) abusing his position as Dato' Sedia Lela;

(iii) guilty of fraud and cheating, in addition to a vile and despicable act ie a betrayal of his own friends and kinsmen, and of a more serious and dangerous

degree than that committed by Dato' Purba; and included fire and arson; drug and poison; and

(iv) seeking to overthrow the Undang.

UTTERANCES ACTIONABLE PER SE

[14] The defendants' utterances disparaging the plaintiff who at the material time held the office of Dato' Sedia Lela of Rembau constituted slander which is actionable per se under s 5 of the Defamation Act 1957 which reads as follows:

> 5. Slander affecting official, professional, or business reputation.
>
> In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

[15] Hence, it is not necessary for the plaintiff to allege or prove special damage.

PUBLICATION OF MINUTES

[16] D1 has under cross-examination at pp 55, 56 and 58 of the notes of evidence admitted that the minutes were prepared and published by him in order to make known to the public the alleged abuse of power by the plaintiff (see also para 7 of D1's defence which was an admission thereof).

[17] D2 in para 7 of his defence also admitted the publication of the minutes to the public at large to enable the public to know of the abuse of power committed by the plaintiff. He repeated the admission when he was cross-examined.

MINUTES DEFAMATORY OF PLAINTIFF

[18] The minutes which recorded the utterances as particularised above are libellous and have disparaged the plaintiff with the aforesaid imputations. Hence, they are defamatory of the plaintiff.

[19] The plaintiff was subsequently removed from his appointment as Dato' Sedia Lela and so could not be appointed as the Undang of Rembau although he was next in line to the appointment.

JUSTIFICTION

[20] DD1 and 2 have raised the defence of justification in that the words uttered by them at the meeting and the minutes containing these utterances were true. That being the case, they bear the burden of proving this defence: *Gatley on Libel and Slander* (7th Ed) paras 351 and 354 cited in *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC).

[21] The Federal Court in International Times, supra, approved the presumption of falsity which operates in favour of the plaintiff ie in a suit for defamation, once the words complained of are proved to be defamatory and published, the plaintiff is not bound to prove the falsity of these words because the law presumes it to be in his favour and the result is that it is for the defendants to prove that these words are true.

[22] Upon an examination and evaluation of D1's evidence in its entirety, I am unable to find anything which is capable of establishing that the allegations made by D1 against the plaintiff were anywhere near the truth. D1 could not remember any date on which the plaintiff had used his position as a Dato' Lembaga and Balai Undang for his own interest, but testified that he (D1) merely heard of it from the secretary of the Undang. When cross-examined further, he admitted that he did not know of the truth of the allegations that he had hurled against the plaintiff.

[23] D2's evidence was self-destructive as he agreed that the allegations which he had made against the plaintiff were untrue and, worse still, he admitted under cross-examination that his own witness' statement was untrue.

[24] D3's evidence did not go further than giving an outline of his own biodata.

[25] In the circumstances, I hold that DD1 to 3 have failed to prove their defence of justification, and so they are liable to the plaintiff for libel and slander.

DAMAGES

[26] The plaintiff through learned counsel Mr Firoz Hussein bin Ahmad Jamaluddin (assisted by Miss Shanti Abraham) is seeking aggravated and exemplary damages against DD1 to 3, on the ground that the allegations made by them against the plaintiff had raised treason, abuse of power and dishonesty and had thereby destroyed the plaintiffs reputation in society. He prayed for a sum of RM5,000,000 against each of the defendants, making a total claim of RM15,000,000.

[27] The response of the defendants' learned counsel Mr Mohd Hasryzal bin Badasary is that the plaintiff has failed to prove these damages.

[28] The evidence adduced before me revealed that DD1 to 3 had made the aforesaid defamatory statements against the plaintiff without any justification at the time when the plaintiff was holding the office of Dato' Sedia Lela which, according to the hierarchy in Luak Rembau, was next in line to the appointment as the Undang of Rembau. He has the legitimate hope of succeeding (or spes successionis) to the exalted position of the Undang of Rembau. However, in view of the defamatory statements which had brought about or contributed to his removal from the appointment of Dato' Sedia Lela, the spes successionis had been dashed and rendered historical. There can be no doubt that he had suffered damages.

[29] In my view, DD1 to 3 who had relied on the defence of justification but failed to discharge the burden of proving it, had exposed themselves to a liability for aggravated and exemplary damages: see *Warwick v Foulkes* (1844) 12 MW 507; *Broome v Cassell* [1972] AC 1027 (HL); *John v MGN* [1997] QB 254 (CA); and *Gatley on Libel and Slander* para 32.53.

[30] DD1 to 3's defence of justification is frivolous and so have further exacerbated the injury to the plaintiffs reputation. It is obvious that DD1 to 3's utterances were defamatory or untrue, and that they were reckless, not caring whether they were true or false.

[31] Be that as it may, the claim for RM5,000,000 by way of aggravated and exemplary damages against each of the defendants or a total sum of RM15,000,000 against them is certainly astronomical and phenomenal. Such a mega figure is unlikely to find favour with our courts. I am unable to find any authority nor was any authority cited for the plaintiff to support such a quantum.

[32] In my view, the aggravated and exemplary damages sought by the plaintiff would be adequately satisfied by an award of RM200,000 against each of the defendants, with interest at 8% pa from the date of judgment to the date of realisation, and costs, all of which I do hereby award.

Order accordingly.

Reported by Peter Ling